

<b>TEXAS MUTUAL INSURANCE</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>COMPANY,</b>	§	
<b>Petitioner</b>	§	
	§	
<b>V.</b>	§	<b>OF</b>
	§	
<b>CLINICAL SUPPORT SERVICES,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**  
**DISPOSING OF CASE BY SUMMARY DISPOSITION AND**  
**INTRODUCING EVIDENCE INTO THE RECORD**

**I. SUMMARY**

Texas Mutual Insurance Company (Carrier or TMIC) sought review of a decision by an Independent Review Organization (IRO) ordering payment to Clinical Support Services (CSS or Provider) for intra-operative nerve monitoring and testing provided during surgery on Claimant. The parties agree that the issue is purely legal. The only issue to be decided by the administrative law judge (ALJ) is whether the Carrier should be required to reimburse Provider for reasonable charges for the monitoring services provided.

Based on admissions and other discovery evidence the ALJ is admitting to the record, and the briefing and arguments of the parties, the ALJ concludes that Provider is not entitled to reimbursement for intra-operative monitoring services because it was not performed in accordance with the portion of the MFG requiring on-site supervision of certain providers. This decision need not reach the question of whether monitoring was medically necessary, as the other issue is a sufficient stand-alone ground to deny reimbursement. That is, even if the ALJ were to conclude the service was medically necessary, it would not change the outcome of this case.

**II. APPLICABLE LAW**

There was no disagreement among the parties that intra-operative monitoring is a health care service reimbursable under the workers' compensation system. In general, this term describes monitoring of a patient's neurological activity during a surgical procedure to provide data to the surgeon regarding possible injury to the nervous system so that the condition can be addressed immediately. The parties agree all Commission rules and provisions of the MFG apply to this service, but disagree on what the applicable rule means. In dispute in this case is the MFG's requirement that a non-licensed health care provider can only administer health care under the direct supervision of a licensed provider for the provider to recover the maximum allowable reimbursement (MAR).<sup>1</sup> Specifically, the passage in the MFG which Carrier contends dictates the practice

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<sup>1</sup> MFG, General Instructions, P.1

conditions for the provision of services by non-licensed personnel states as follows:

The Texas Workers Compensation Commission *Medical Fee Guideline* (MFG) 1996, shall be effective for all medical services rendered by Health Care Providers (HCP) on or after April 1, 1996. **The MFG does not supersede scope of practice limitations for HCP specialities. The listed maximum allowable reimbursements (MAR) only apply when a licensed HCP is performing those services within the scope of practice for which the provider is licensed, or when a non-licensed individual is rendering care under the direct on-site supervision of a licensed HCP.** For the purposes of this guideline, on-site supervision is defined as the presence of the licensed HCP at the location where the service is being rendered by a non-licensed individual and direct visual and verbal contact with the patient at scheduled intervals during the period of time for which treatment is being provided. (Emphasis in original)

Carrier argues that in similar cases decided by SOAH ALJs, the issue of whether an unlicensed provider should be reimbursed for intra-operative monitoring services performed during spine surgery on a claimant, where direct, on-site supervision pursuant to the MFG was not provided, have been decided negatively.<sup>2</sup> It argues this case should be decided similarly.

Provider, on the other hand, argues that the unlicensed monitoring technician was supervised at all times by the orthopedic surgeon in charge of the operating procedure, and, thus, met the on-site supervision requirement of the MFG.

### III. FACTS OF THIS CASE

Claimant \_\_\_ was a \_\_\_ who on \_\_\_, underwent a spinal laminectomy and fusion in his back at the L3-L4 and L5-S1 levels. Intra-operative monitoring was performed by CSS's technician, Melanie Goldberg, and monitored off-site by Dr. Thomas Mitchell, neurologist. This monitoring was provided at the contractual request of the orthopedic surgeon, Larry M. Kjeldgaard, D.O. CSS has provided these same types of surgical monitoring services for Dr. Kjeldgaard for the last five years. In this case, CSS's unlicensed technician, Melanie Goldberg, sent intra-operative monitoring data from an operating room at North Hills Hospital in North Richland Hills, Texas, to the Fort Worth office of Dr. Mitchell, over 11 miles away. Dr. Kjeldgaard stated that he exercised complete control over the information generated by Ms. Goldberg and provided her the instructions necessary for gathering of the data required by the procedure in question. Dr. Kjeldgaard reports that he did not supervise the function of Ms. Goldberg in applying the electrodes or interpreting the electronic impulses generated, but noted that the board certified physician neurologist, Dr. Mitchell, monitored the electronic signals generated in the operating room, in real time, via computer modem. Both Ms. Goldberg and Dr. Kjeldgaard stated that Dr. Mitchell's comments are immediately communicated to Dr. Kjeldgaard through Ms. Goldberg in the operating room. Dr. Kjeldgaard reported that he was solely responsible for the ultimate interpretation of the data generated.

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<sup>2</sup> See the Decisions and Orders in Docket Nos. 453-01-2118.M5, 453-01-2848.M5, and 453-01-3310.M4.

#### IV. DISCUSSION

Notwithstanding Provider's argument that it has satisfied the supervision requirement in the MFG with the supervising presence of the operating surgeon, the ALJ finds that this type of supervision is not the direct, specialty-specific, employer-type supervision that the MFGs contemplate. The MFG language at issue closely tracks the definitions in § 401.011 of the Act that incorporate the concept of supervision of non-licensed providers :

- (21) "Health care practitioner" means:**
  - (A) an individual who is licensed to provide or render and provides or renders health care; or**
  - (B) a nonlicensed individual who provides or renders health care under the direction or supervision of a doctor.**
- (22) "Health care provider" means a health care facility or health care practitioner.**

Although Ms. Goldberg had undergone specific training in intra-operative monitoring, she did not hold certification and licensing in the specialty at issue at the time of the service. The MFG General Instruction invokes the practice limitations that the state applies to the various types and classes of licensed health care providers where it states the MAR applies "only when a licensed HCP is performing those services within the scope of practice for which the provider is licensed."

Provider did not have the required licensed personnel in the operating room, or anywhere that could be defined as on-site, at the time of the surgery to supervise the technician, so it did not meet the prerequisites the Commission has laid down for compensation of this type of service. While the surgeon in the operating room in a broad sense is responsible for all actions that happen during an operation, the monitoring technician is an employee of the monitoring firm with whom the surgeon has contracted. As such, the technician is either supervised, as an employee performing her monitoring services, by the off-site neurologist in this case, or some off-site principal or employee of CSS. She is not, in the ultimate performance of her monitoring duties, supervised by the surgeon.

The ALJ is not expressing an opinion about how the intra-operative monitoring business should be conducted. For all he knows, this case may represent the industry standard for this service. The ALJ is finding, however, that the Commission's then-existing reimbursement rules limit reimbursement for intra-operative monitoring of this nature.

#### V. CLINICAL SUPPORT SERVICES' CROSS-MOTION FOR SUMMARY DISPOSITION

CSS filed a cross-motion for summary disposition basically arguing, as a matter of law, that the orthopedic surgeon's supervision of the monitoring technician satisfies the supervision requirements of the MFG. For the reasons discussed above, the ALJ disagrees with and denies that motion.

## VI. FINDINGS OF FACT

1. On \_\_\_\_, Claimant \_\_\_\_ suffered a compensable lower-back spine injury at his job.
2. On the date of Claimant's injury, The Texas Fund (Carrier) was the workers' compensation insurer for Claimant's employer.
3. Dr. Larry M. Kjeldgaard, D.O., performed spinal fusion surgery on Claimant on \_\_\_\_, at the at North Hills Hospital in North Richland Hills, Texas, to treat Claimant's compensable spine injury.
4. In support of that operation, Dr. Kjeldgaard ordered that intra-operative neurophysiology monitoring be conducted during his performance of the surgical procedures. Clinical Support Services (Provider) was employed to perform the monitoring.
5. The reviewing physician was not on-site at the hospital supervising the intra-operative monitoring performed on Claimant on \_\_\_\_. Request For Admission (RFA) Response 1.
6. The reviewing physician did not provide direct on-site supervision for the intra-operative monitoring which was performed on Claimant. RFA Resp. 2.
7. The intra-operative monitoring technician who conducted the intra-operative monitoring on Claimant was not licensed by the State of Texas for performance of intra-operative monitoring. RFA Resp. 3.
8. The reviewing physician was not on-site at the hospital during the time when Claimant's surgery was performed. RFA Resp. 11.
9. The surgical services for which intra-operative monitoring has been billed were performed on Claimant at the Hospital. RFA Resp. 12.
10. The Hospital is at least 11 miles from the location where the reviewing physician was located when Claimant's surgery was performed. RFA Resp. 13.
11. The reviewing physician was not in the operating room at the Hospital, or anywhere in the Hospital, at any time during the surgery on the Claimant. RFA Resp. 19.
12. The reviewing physician did not instruct the intra-operative monitoring technician as to which equipment settings to use for the intra-operative monitoring on Claimant. RFA Resp. 21.
13. The reviewing physician did not instruct the intra-operative monitoring technician as to when to begin and end EMG or Needle EMG or "free run EMG" during Claimant's surgery. RFA Resp. 22.
14. The reviewing physician did not have direct verbal or visual contact with the Claimant while intra-operative monitoring was being performed by the technician. RFA Resp. 23 and 24.
15. The reviewing physician did not train the technician who provided intra-operative

monitoring services to Claimant in performance of SSEP or EMG intra-operative monitoring. RFA Resp. 31.

16. At the time of the Claimant's surgery, the only information the reviewing physician had about the patient's medical condition or history was the information transmitted from the operating room by the intra-operative monitoring technician. RFA Resp. 35.
17. CSS hold no professional license. Resp. to Int. 11.
18. Melanie Goldberg, an employee of CSS, was not supervised in her capacity as an intra-operative monitor by any licensed health care provider present at North Hills Hospital.
19. Carrier denied payment to Provider for the intra-operative neurophysiology testing.
20. Provider timely appealed the Carrier's denial of benefits to an Independent Review Organization (IRO).
21. On April 25, 2003, the MRD concluded that Provider was entitled to reimbursement for the intra-operative monitoring services provided here.
22. On May 8, 2003, Petitioner filed a timely request for a hearing at the State Office of Administrative Hearings (SOAH) to reconsider the MRD decision.

## **VI. CONCLUSIONS OF LAW**

1. The Texas Workers' Compensation Commission has jurisdiction to decide the issues presented pursuant to TEX. LABOR CODE § 413.031.
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a Decision and Order, pursuant to TEX. LAB. CODE ANN. § 413.031 and TEX. GOV'T CODE ANN. ch. 2003, and the authority to resolve cases on summary disposition, pursuant to 1 TEX. ADMIN. CODE § 155.57.
3. All notices of hearing issued by the Commission conformed to the requirements of TEX. GOV'T CODE ANN. § 2001.052 in that they contained a statement of the time, place and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular section of the statutes and rules involved; and a short plain statement of the matters asserted.
4. Petitioner has the burden of proving by a preponderance of the evidence that it should prevail in this matter. TEX. LABOR CODE § 413.031.
5. Petitioner is a provider of health care services within the meaning of TEX. LABOR CODE § 401.011 (21) and (22). As such, Petitioner is subject to Commission rules governing the provision of health care services by its staff or persons used by it to provide its monitoring service, including the *Medical Fee Guideline*, 28 TEX. ADMIN CODE (TAC) § 134.201.
6. Petitioner failed to prove by a preponderance of the evidence that the intra-operative

monitoring it performed in connection with the April 19, 1999 spine surgery on Claimant was performed in accordance with the *Medical Fee Guideline* General Instructions, 28 TAC § 134.201(e)(1), which requires on-site supervision by a licensed provider when a non-licensed person is providing health care to workers' compensation claimants.

7. Under TEX. LABOR CODE § 413.011 *et seq.*, the Carrier is required to reimburse health care providers only for those services provided for the benefit of workers' compensation claimants that are performed in the manner set forth in the applicable portions of the Labor Code and Commission rules.

### **ORDER**

IT IS THEREFORE, ORDERED Carrier's Motion for Summary Disposition is granted and Provider's request for reimbursement from Texas Mutual Insurance Company for intra-operative monitoring services rendered by Provider on behalf of Claimant \_\_\_\_, on \_\_\_\_, is summarily denied. It is further ordered that Provider's discovery responses to TMIC's requests for admissions and interrogatories, and Provider's affidavits from Dr. Larry M. Kjeldgaard and Melanie Goldberg are admitted for the truth of the facts in those documents. Finally, it is Ordered that Provider's Cross Motion For Summary Disposition is denied.

**SIGNED February 25, 2004.**

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**BILL ZUKAUCKAS  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**